(FEDERAL MARITIME COMMISSION)
(SERVED OCTOBER 15, 1987)
(EXCEPTIONS DUE 11-6-87)
(REPLIES TO EXCEPTIONS DUE 11-30-87)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1513

APPLICATION OF EVERGREEN INTERNATIONAL (U.S.A.) CORP.
FOR THE BENEFIT OF SERVICE CONTRACT SHIPPER

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1. The Commission's Special Docket Procedures arise from the enactment of section 8(e) of the Shipping Act, 1984, formerly section 18(b)(3) of the Shipping Act, 1916, and those sections specifically apply to tariffs which are required to be filed containing certain information under section 8(a), of the 1984 Act.

2. Although service contracts contain rates which relate to the movement of cargo as do tariffs, they are not tariffs but rather are agreements between commercial parties containing specific provisions which the parties have themselves negotiated. While the Commission may regulate service contracts within the terms of the Shipping Act, 1984, it does not have authority to grant permission to waive or refund freight charges relating to service contracts under section 8(e) of the 1984 Act.

INITIAL DECISION[1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

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[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

Facts

This application is for permission to waive collection of freight charges of $19,285.50 arising out of four shipments of hay from Seattle, Washington, to Kobe and Yokohama, Japan, respectively. The applicant, Evergreen International (U.S.A.) Corporation (Evergreen) requests such action pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 8(e) of the Shipping Act of 1984.

The applicant presents facts that indicate that Evergreen entered into a service contract with a shipper wherein it agreed to transport hay from Seattle to Kobe and/or Yokohama for $700.00 per 40 foot container. The contract was executed on November 14, 1986, and was mailed to New York's Evergreen office for filing. According to the applicant the New York office did not receive the service contract and it was not filed until on or about December 22, 1986, three days after it was initially discovered that the contract had not been filed.[2]

On December 1, 1986, two shipments of hay moved from Seattle to Yokohama and Kobe, respectively, and on December 13, 1986, two additional shipments moved from Seattle to the same respective destinations.[3] At the time the shipments were made, the applicable tariff on file with the Commission was Evergreen Marine Corp., Westbound Local and Intermodal Freight Tariff, F.M.C. No. 132, from U.S. Ports and

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[2] See letter of Robert Chang, Deputy Jr. Vice-President, dated April 29, 1987.

[3] Application; Bills of Lading, Nos. 12993, 12994, 13080 and 13081, respectively.

Points (See Rule 1), via USWC Interchange Ports (See Rule 1), to Northeast Asia Base Ports in Japan, Korea, Taiwan, and Hong Kong (See Rule 1). It contained a $925.00 per 40 foot container rate (plus 21% CAF) for hay (Item No. 012-0190), moving from Seattle.[4] The applicant seeks permission to waive the payment of freight charges of $19,285.50, computed as follows:[5]

Vessel	B/L No.	B/L Rate	Tariff Rate	Amount to Be Waived
J. Apolo V0024-073W	STLYKE 2307	$ 3,500.00	$ 5,596.25	$ 2,096.25
J. Apolo V0024-073W	STLKBG 2308	17,500.00	27,981.25	10,481.25
Pacific Arrow V0025-050W	STLYKH 2408	4,200.00	6,175.50	2,575.50
Pacific Arrow V0025-050W	STLKBG 2409	7,000.00	11,192.50	4,192.50
Total		$32,200.00	$51,485.50	$19,285.50

Discussion and Conclusions

At the outset it should be noted that this proceeding does not involve the usual Special Docket Application contemplated in the Commission's Rules of Practice and Procedure at section 502.92 (46 CFR 502.92). Rather, it is a case of first impression which raises the ultimate question of whether or not section 8(e) of the Shipping Act of

[4] Application; 22nd and 23rd Rev. Page 101A, effective November 26, 1986, and December 12, 1986, respectively.

[5] As the bills of lading indicate, payments were made by the shipper at the $700.00 rate set forth in the service contract.

1984 (formerly section 18(b)(3) of the Shipping Act of 1916), applies to service contracts so as to allow for the waiver and/or refund of freight charges under the provisions of that section.

Section 8(e) reads as follows:

> (e) Refunds.--The Commission may, upon application of a carrier or shipper, permit a common carrier or conference to refund a portion of freight charges collected from a shipper or to waive the collection of a portion of the charges from a shipper if--
>
> (1) there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and the refund will not result in discrimination among shippers, ports, or carriers;
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> (2) the common carrier or conference has, prior to filing an application for authority to make a refund, filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;
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> (3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Commission may require that give notice of the rate on which the refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; and
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> (4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.

For purposes of this proceeding the pertinent portions of section 8(e) of the 1984 Act are the same as those contained in section 18(b)(3) of the 1916 Act, with one notable exception that will be discussed later--the fact that shippers as well as carriers may make application for waiver or refund.

Section 18(b)(3) was originally enacted in 1916 and prohibited charging a greater or lesser or different compensation for the carriage

of cargo than the rates and charges set forth in a duly filed tariff. In filing tariffs in the foreign commerce errors occurred which resulted in unintentional increases in tariff charges which sometimes resulted in the imposition of rates which were clearly disproportionate and unreasonable. In Swedish American Line--Application to Refund, 8 F.M.C. 142 (1964), the Commission granted relief for such an error when carriers sought to adopt a procedure used in the domestic trades. However, in Mueller v. Peralta Shipping Corp., 8 F.M.C. 361 (1965), the Commission reversed itself holding that since the mandate of section 18(b)(3) was clear and absolute, and that since the Commission could not determine the reasonableness of rates and award reparations in the foreign commerce as it could in the domestic commerce, it could not undertake to correct such errors in the foreign commerce.

Although the Commission's holding in Mueller, supra, was correct, it created hardship and proved to be less than pragmatic. As one might expect, Congress undertook to remedy the situation by prescribing relief for tariff errors made in the foreign commerce under certain conditions.[6] Those conditions, which are now part of section 8(e), of the 1984 Act, and which have already been quoted above, are designed to prevent rebating and discrimination in the retroactive application of an intended tariff rate which is allowed to apply because of clerical or administrative error. Since the enactment of section 18(b)(3) and the original publication of the Special Docket Procedures in the Commission's Rules, thousands of cases granting relief by waiver or refund have been decided and various guidelines and principles have evolved

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[6] Pub. L. No. 90-298, 82 Stat. 111 (1968). See also 1968 U.S. Code Cong. & Ad. News, 2d Sess., 1911, 1912-13.

respecting the conditions set forth in that section and its successor, section 8(e). In some of the cases, and notably more recent ones, the statute has been recognized as a remedial one to be given a broad interpretation to accomplish its purpose. Application of Afram Lines Ltd. for the Benefit of Commodity Credit Corp., Spec. Dkt. No. 1344, Init. Dec. served 8-30-85, adopted 10-4-85; Application of Gulf European Frt. Assn., Agreement No. 10270, et al., Spec. Dkt. No. 1377, Init. Dec. served 5-19-86, adm. final 7-25-86. Yet, in other cases, where jurisdiction is the issue and/or where one of the four conditions of section 8(e) is involved, the Commission has not hesitated to adopt a strict interpretation noting that the provisions of the statute, "are not of a discretional procedural nature," Commodity Credit Corp. v. Surinam Navigation Co. Ltd., 19 F.M.C. 65 (1975), and that it will not be tempted by applications for relief "addressed to some undefined well spring of equity in the Commission rather than to any basis of law," Plaza Provision Co. and Pueblo Supermarkets, Inc. v. Maritime Service Corp., 17 F.M.C. 47, 50 (1973).[7]

In light of all of the above, it is necessary to consider whether or not section 8(c) of the Shipping Act of 1984, which has to do with service contracts, comes under the ambit of section 8(e). Specifically, is a service contract a tariff so that section 8(e) applies? Section 8(c) of the Shipping Act, 1984, states:

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[7] See also Henri I. Daty, Inc. v. Pac. Westbound Conf., 20 F.M.C. 391 (1978); Farr Co. v. Seatrain Lines, 20 F.M.C. 412 (1978); and Hapag Lloyd Aktiengesellschaft for the Benefit of Windsor Industries, Spec. Dkt. No. 1211, Init. Dec. served 12-31-84, adopted 2-6-85.

(c) Service Contracts.--An ocean common carrier or conference may enter into a service contract with a shipper or shippers' association subject to the requirements of this Act. Except for service contracts dealing with bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, each contract entered into under this subsection shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include--

(1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;

(2) the commodity or commodities involved;

(3) the minimum volume;

(4) the line-haul rate;

(5) the duration;

(6) service commitments; and

(7) the liquidated damages for nonperformance, if any.

The exclusive remedy for a breach of a contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree.

In section 3, par. (21), of the 1984 Act a service contract is defined as follows:

(21) "service contract" means a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level--such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

Section 8(c) of the Act appears in the law under the heading "Tariffs." It is specifically exempted from prohibitions against unfair or unjustly discriminatory practices in many areas such as rates, cargo classifications, cargo space accommodations and is not included in the prohibition against making or giving an undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever.[8]

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[8] Sec. 10. Prohibited Acts--46 U.S.C. App. § 1709 (Supp. II 1984).

* * *

(b) Common Carriers.--No common carrier, either alone or in conjunction with any other person, directly or indirectly, may--

* * *

(6) except for service contracts, engage in any unfair or unjustly discriminatory practice in the matter of--

(A) rates;

(B) cargo classifications;

(C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;

(D) the loading and landing of freight; or

(E) the adjustment and settlement of claims;

* * *

(11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;

With respect to the above exemptions Congress noted that:[9]

> Because service contracts will selectively favor some shippers several of the proscribed acts (section 10(b)(6) and (11)) were amended to assure that service contracts may discriminate as to rate and cargo classifications, and provide distinct advantages or preferences that might otherwise be in violation of the Act. Such differences are the very nature of contract service.

Even more importantly, in the House Conference Report, Joint Explanatory Statement of the Committee of Conference at page 29,[10] in discussing independent action on rates or service items required to be filed in a tariff under section 8(a) of the bill, the Report states:

> Section 8(a) does not require that service contracts be filed in a tariff. Consequently, section 5(b)(8) does not permit their members a right of independent action on service contracts. The conferees agree that section 8(c) of the bill, which authorizes the use of service contracts, cannot be read as undermining the authority of a conference to limit or prohibit a conference member's exercise of a right of independent action on service contracts. (Emphasis supplied.)

It is clear from all of the above that a service contract is not a tariff. Certainly, it contains provisions relating to rates and practices which provisions are similar to those found in tariffs, but that is hardly sufficient to warrant classifying them as tariffs. Rather, unlike tariffs which unilaterally provide for rates and practices, service contracts are commercial agreements between independent parties which, in addition to the rates and services, may contain many other terms completely foreign to the traditional tariff.

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[9] H. Conf. Rep. No. 98-600, 98th Cong, 2d Sess. 296 (1984).

[10] H. Conf. Rep. No. 98-600, U.S. Code Cong. & Ad. News, 98th Cong., 2d Sess. 285 (1984).

Since service agreements are not tariffs they cannot give rise to a waiver or refund of freight charges as contemplated by section 8(e), and here the application must, therefore, be denied on jurisdictional grounds. It is readily apparent from a reading of the Shipping Act of 1984, as well as the pertinent legislative history, that Congress did not intend that service contracts be treated as tariffs so as to come within the purview of section 8(e). Further, while there is no indication that the Congress even seriously felt it necessary to consider that prospect, there is ample evidence that they would have rejected it had they done so. There are provisions throughout the 1984 Act supporting such a view.

For example, we have just quoted that portion of the Conference Report which specifically states that service contracts (as well as the essential terms) need not be filed in a tariff. This indicates that Congress viewed service contracts and their essential terms as something different than the traditional tariff, or else they would have simply required the essential terms to be published in tariffs. Instead, they chose to require the filing of the service contracts with the Commission, and the making of the essential terms available to the public "in tariff format"--not in a tariff. The distinction is apparent. If there is any question one need only look to the application of other provisions in the statute. For example, section 8(a) of the 1984 Act (46 U.S.C. app. § 1707(a)(1)) requires, with certain exceptions not relevant here, that all common carriers must file with the Commission tariffs showing their rates and charges. The statute, in section 9 (46 U.S.C. app. § 1708), also requires that no controlled carrier "may maintain rates or charges in its tariffs filed with the Commission, that

are below a level that is just and reasonable" (Emphasis supplied). Section 9 provides further, at 9(e), that the rates and charges of a controlled carrier "may not, without special permission of the Commission, become effective sooner than the 30th day after the date of filing with the Commission." (Emphasis supplied.) Suppose a controlled carrier had a service contract which requires the contract and its essential terms to be filed with the Commission, would the rates in the service contract have to await the 30 day time lapse or would they become effective immediately on filing of the agreement? Obviously, if the service contract were a tariff the 30 day period would have to apply. If it were not a tariff the time period would be inapplicable under section 9(c). As as been shown, not only has Congress failed to treat service contracts as tariffs but it does not even require that their essential terms be filed in tariffs so that the 30 day period obviously does not apply and the terms of the service contract are immediately effective on filing.

When one moves from section 8(c) and views the question of whether or not section 8(e) applies to service contracts from the aspect of the language of 8(e) itself, the holding that service contracts are not contemplated within the meaning of the statute is even more compelling. Of course, when section 18(b)(3) was originally enacted in 1968, service contracts were not considered at all by the Congress, at least not on any written record. The reasons for the enactment of section 18(b)(3) has already been discussed as has the evolution of the Special Docket Procedure--and service contracts simply did not come under meaningful consideration until the 1984 Act. In enacting section 8(e) of the 1984 Act Congress did not materially change the language of section 18(b)(3)

of the 1916 Act. Instead, it retained the same four requirements that were in the original section 18(b)(3) of the 1968 amendment. It referred to "clerical or administrative" errors in tariffs, and the filing of a new tariff, and the publishing of a notice in a tariff--and never mentioned service contracts. In providing that it was essential that the waiver or refund "will not result in discrimination among shippers, ports, or carriers," it did not explain or even mention the obvious exceptions made for service contracts in section 10(b)(6) and (11). Its failure to do so is further evidence of the fact that the statute treats tariffs and service contracts in a different manner and that the rules applicable to one were not always meant to apply to the other.

Further, if consideration is given as to how the provisions of section 8(e) of the 1984 Act could be applied to service contracts in an even-handed, reasonable, pragmatic way, the wisdom of Congress in excluding service contracts becomes even clearer. Any attempt to do so raises alternatives which are patently outside the province of the Commission's regulatory authority. In section 8(c) of the 1984 Act relating to service contracts it is provided that:

> The exclusive remedy for a breach of contract entered into under this subsection shall be an action in an appropriate court, unless the parties agree otherwise.

Given the inclusion in section 8(e) of a "shipper" as an applicant for refund or waiver in addition to a carrier, and given the joint nature of the service contract agreement, how would the Commission treat an application of a shipper for waiver or refund where the shipper and carrier disagreed on a particular provision and that provision was

identified as the mistake (e.g., where the service contract is not timely filed and the shipper claims it is the mistake (fault) of the carrier who agreed to file it, but the carrier denies making any such agreement)? Would the Commission undertake to decide whether or not the "mistake" occurred thereby calling into question the role of the "appropriate court" mentioned in the statute? Indeed, in service contracts generally how would the Commission initially apply the concept of an "error in a tariff of a clerical or administrative nature"?

Consideration of the above questions and a host of others that could be raised, together with the prior discussion, clearly militates any holding that service contracts are tariffs or should be treated as tariffs coming within the ambit of section 8(e) of the Shipping Act, 1984. Therefore, as has been noted, the application before us must be denied. Further, in this writer's view the temptation to provide some kind of comparable treatment for this or other service contracts ought to be resisted because they are commercial agreements. They simply do not lend themselves to the Special Docket procedures and the application of those procedures would in all likelihood raise many problems, some foreseeable and some not.

In any event, in the view of this writer, the posture of mistakes or errors made in service contracts is the same today as was the question presented to Congress in 1968 when it considered mistakes made in tariffs. If, as it did respecting tariffs, it felt there was a need to grant relief for errors in service contracts and spelled out the conditions under which that relief might be given--and those conditions could differ materially from those required where tariffs are involved--then the Commission could act in accordance with Congressional intent.

However, where, as here, there has been no legislation, the Commission has no more authority to grant relief for mistakes made in service contracts than it had over mistakes made in tariffs prior to 1968, and the enactment of the appropriate legislation.

In light of all of the above, this proceeding is hereby discontinued.

Joseph N. Ingolia
Administrative Law Judge

Washington, D.C.
October 13, 1987

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1513

APPLICATION OF EVERGREEN INTERNATIONAL (U.S.A.) CORP. FOR THE BENEFIT OF SERVICE CONTRACT SHIPPER

ORDER ADOPTING INITIAL DECISION IN PART

On October 15, 1987, Administrative Law Judge Joseph N. Ingolia (" Presiding Officer") served an Initial Decision ("I.D.") in the above-referenced proceeding holding that the refund/waiver procedures of section 8(e) of the Shipping Act of 1984 ("1984 Act"),* 46 U.S.C. app. § 1707(e), do not

* Section 8(e), 46 U.S.C. app. § 1707(e), provides as follows:

> (e) Refunds. - The Commission may, upon application of a carrier or shipper, permit a common carrier or conference to refund a portion of freight charges collected from a shipper or to waive the collection of a portion of the charges from a shipper if-
>
> (1) there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and the refund will not result in discrimination among shippers, ports, or carriers;
>
> (2) the common carrier or conference has, prior to filing an application for authority to make a refund, filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;
>
> (3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Commission may require that give notice of the rate on which the refund or waivers would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; and
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> (4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.

apply to service contracts. No exceptions to the I.D. were filed, but the Commission decided to review the I.D. on its own motion.

BACKGROUND

Evergreen International (U.S.A.) Corporation ("Evergreen") entered into a service contract to transport hay from Seattle to Japan. The signed contract was mailed to Evergreen's New York office for filing with the Commission. However, the contract was allegedly not received by that office. By the time this error was discovered, four shipments had already moved and should have been rated at the higher tariff rates. Evergreen filed an application for permission to waive collection of that amount of the freight charges that exceeded the service contract rate, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92(a), and section 8(e) of the 1984 Act.

The Presiding Officer held in his I.D. that section 8(e) could not be used to afford relief from errors in service contracts. He viewed the central issue to be whether a service contract is a "tariff" for purposes of section 8(e). He concluded that a service contract is not a tariff based on: 1) the definition of "service contract," 46 U.S.C. app. § 1702(21); 2) the fact that service contracts are exempted from many of the prohibitions of the 1984 Act; and 3) language in the Conference Report to the

1984 Act stating that "[s]ection 8(a) does not require that service contracts be filed in a tariff." H.R. Rep. No. 600, 98th Cong., 2d Sess., 29 (1984).

The Presiding Officer also expressed his opinion that even if Congress had considered section 8(e) relief for service contracts, it would have rejected it. He further suggested that the Commission resist the temptation to provide some kind of relief for service contract errors because service contracts are commercial agreements. Lastly, he concluded that the Commission could not provide any such relief without the enactment of appropriate legislation.

DISCUSSION

The Initial Decision's ultimate conclusion (i.e., that the waiver/refund relief procedure of section 8(e) is not available for service contracts) is correct, and will be adopted by the Commission. Although service contracts contain rates, they are more than a mere rate offering in a tariff. Congress distinguished service contracts from tariff rates throughout the 1984 Act. Service contracts are not required to be filed in tariffs pursuant to section 8(a) of the 1984 Act, 46 U.S.C. app. § 1707(a), and many of the prohibitions of that Act that apply to tariff rate actions specifically do not apply to service contracts because of their unique nature, i.e., they may selectively favor some shippers. See H.R. Rep. No. 600, 98th Cong., 2d Sess., 40

(1984). Therefore, an error in a service contract, regardless of its nature, is not "an error in a tariff" for which section 8(e) relief can be granted.

There is nothing in the legislative history of the 1984 Act which indicates that Congress considered the question of relief from service contract errors. Nonetheless, it did carry forward intact the procedures for relief from tariff errors, while at the same time clearly indicating that service contracts were not rates in tariffs. Therefore, it appears, at the very least, that Congress did not specifically intend section 8(e) to apply to service contract errors.

What Congress might have done had it considered the possibility of relief for service contract errors, whether the Commission can develop some alternative form of such relief, and whether additional legislation may be necessary, are all issues that are not relevant to the disposition of the application under section 8(e) and, therefore, need not be decided here. Accordingly, the Commission is not adopting those portions of the I.D. that address these issues.

THEREFORE, IT IS ORDERED, That that portion of the Initial Decision consistent with the above discussion (pages 1-9 and the first two sentences on page 10) is adopted by the Commission; and

IT IS FURTHER ORDERED, That the application for permission to waive certain freight charges filed by Evergreen International (U.S.A.) Corporation is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

Joseph C. Polking
Secretary